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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL.,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, International Longshoremen's Association and certain Locals thereof,[1] respectfully petition this Court for a writ of certiorari to review the judgment and opinion entered on April 11, 1975, in this proceeding by the United States Court of Appeals for the Fifth Circuit.

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[1] The petitioners herein are the International Longshoremen's Association, the South Atlantic and Gulf Coast District of the Association and 31 Local Unions within the State of Texas which are chartered by the Association. The Local Unions are Nos. 1273, 307, 1576, 1610, 1029, 341, 1224, 636, 1723, 1763, 1581, 1330, 1280, 1367, 872, 325, 1306, 440, 1175, 814, 991, 1818, 1758, 1281, 1225, 851, 1331, 1525, 1316, 1406, and 1646.

OPINIONS BELOW

The opinion of the Fifth Circuit, rendered on April 11, 1975, is reported at 511 F.2d 273 and is reprinted in Appendix A hereto, p. 1a, *infra.*

The interlocutory decree of the United States District Court for the Southern District of Texas, from which the appeal below was taken and which is dated October 1, 1973, is not reported. It is reprinted in Appendix B hereto, p. 15a, *infra.*

The memorandum opinion of the District Court, upon which the interlocutory decree was based, was entered on November 12, 1971, and is reported at 334 F. Supp. 976. It is reprinted in Appendix C hereto, p. 26a, *infra.*

JURISDICTION

This is a suit brought by the United States under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., naming the petitioners herein as defendants. On October 1, 1973, the District Court entered an interlocutory decree which *inter alia* denied the relief sought by the United States that would have required the merger of those Local Unions that were racially segregated. From that refusal to grant such relief, the United States filed an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1).

On April 11, 1975, the Fifth Circuit ruled that it had jurisdiction over the § 1292(a)(1) appeal and that the District Court had erred in denying the relief sought by the United States. 511 F.2d 273. The petitioners herein did not seek a rehearing of that determination.

On timely application, filed within 90 days from the entry of the Fifth Circuit's judgment, Mr. Justice

Powell on June 30, 1975, ordered that the time for filing this petition for certiorari be extended to and including September 8, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a proceeding to enjoin specified violations of Title VII of the Civil Rights Act of 1964, a federal court has discretion under § 706(g) of the Act to decline a request for the merger of racially segregated local unions where the court has determined that all the proven violations of Title VII can be cured by other means short of merger.

2. Whether Title VII of the Civil Rights Act of 1964 mandates a federal court to order the merger of multiple racially segregated local unions where (a) there was either some or no evidence that the mere maintenance of such local unions has resulted in discriminatory employment practices, and (b) all the proven violations of Title VII, including those ascribable to the maintenance of such local unions, have been found curable by other means short of merger.

3. Whether the Interlocutory Appeals Act, 28 U.S.C. § 1292(a)(1), gives a court of appeals jurisdiction to entertain an appeal from an interlocutory denial of a request that the maintenance of racially segregated local unions be permanently enjoined under Title VII of the Civil Rights Act of 1964 where there is no claim or evidence that such denial might cause "serious, perhaps irreparable, consequence" prior to the entry of a final decree, at which time the request for such relief could be renewed and reconsidered.

STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1964, Title VII, § 703(c) (2), 42 U.S.C. § 2000e-2(c)(2):

(c) It shall be an unlawful employment practice for a labor organization—

* * * * * *

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin;

* * * * * *

Civil Rights Act of 1964, Title VII, § 706(g), 42 U.S.C. § 2000e-5(g):

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . .

Interlocutory Appeals Act, 28 U.S.C. § 1292(a) (1):

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

A. Introductory overview

This proceeding arrives here via the Interlocutory Appeals Act, 28 U.S.C. § 1292(a)(1). It involves an effort by the Government to compel a federal district court, in the midst of an ongoing proceeding under Title VII of the Civil Rights Act of 1964, to insert in its eventual final order an arbitrary command that some 37 segregated local unions operating in various Texas Gulf Coast ports be merged on a port-by-port basis.

The locals involved are all affiliated with the International Longshoremen's Association ("I.L.A."). Within each of the ten ports along the Texas Gulf Coast, so-called "sister" locals—segregated by race or national origin—have long operated harmoniously side by side. With but one exception, all of these locals desire to retain their own separate identities; and they have consistently opposed efforts by the Government to compel their merger on a port-by-port basis.

Since early in this century, the major feature of this union structure has been the division of work in each port on a 50-50 percent basis between the respective "sister" locals, each operating its own hiring hall and

seniority referral system. Another critical feature of this organizational arrangement has been a highly integrated international union, a district organization, and bargaining committees which control contract negotiation, contract administration, and all union policies.

The District Court in this proceeding has made a preliminary "basic finding" that this 50-50 percent rule does violence to Title VII because it deprives longshoremen, "be they Black or White, Anglo, Mexican-American or Negro," of working opportunities "depending on which group is in the majority in the different ports." See pp. 35a-36a, *infra*.[2] And in its in-

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[2] The propriety of that interlocutory finding as to the illegality of the 50-50 rule is not involved in the present proceeding before this Court. Any protest must await the entry of a final decree.

However, at the very least, the 50-50 division of work is a refreshing contrast to the questionable status of equal work opportunities in other industries, a status that has given rise to tedious litigation and lengthy governmental efforts to overcome the obvious inequalities. The population ratio on the Texas Gulf Coast, in general, is 80% Black and 20% White; and in Houston, the nation's second largest port, the percent ratio is 75-25. The petitioners herein presented extensive evidence in the District Court to show that the 50-50 rule is a realistic reflection of the racial composition of the longshore work force in the port of Houston, as well as in other ports.

While these I.L.A. unions have given priority and effective attention to equalizing work opportunities, other industries have driven various courts of appeals to approve the use of quota or ratio standards, at least on a temporary remedial basis. See, e.g., *United States* v. *Masonry Contractors Assn. of Memphis*, 497 F.2d 871 (6th Cir. 1974), which ordered that hiring hall referrals of Black employees must equal 5% of the man hours; *Carter* v. *Gallagher*, 452 F.2d 315, 319 (8th Cir. 1971, en banc), cert. denied, 406 U.S. 950 (1972); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 173, n. 47 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971); *United States* v. *Ironworkers, Local 86*, 443 F.2d 544, 553 (9th Cir. 1971), cert. denied,

terlocutory decree, the District Court has determined that any violation of Title VII that has occurred in this case can be "fully corrected" by abolishing the locals' separate hiring halls and by establishing common hiring halls and common seniority classifications. See p. 15a, *infra*. The court has accordingly set up an elaborate procedure, under the supervision of a court-appointed arbitrator, for implementing the common hiring hall and seniority requirements. Eventually those requirements, including their implementation, will be incorporated in a final decree. At the time this interlocutory appeal was taken by the Government,

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404 U.S. 984 (1971), where hiring hall referrals of Black employees shall equal 30% of the total; *United States* v. *International Brotherhood, No. 38*, 428 F.2d 144, 149 (6th Cir. 1970), cert. denied, 400 U.S. 943 (1970); *Local 53 of International Heat & Frost I. & A. Workers* v. *Vogler*, 407 F.2d 1047, 1052 (5th Cir. 1969), where hiring hall referrals shall be 50-50 as between Blacks and Whites; *United States* v. *Wood, Wire & Metal Lathers Int'l Union, Local 46*, 471 F.2d 408, 413 (2nd Cir. 1973), cert. denied, 412 U.S. 939 (1973), where hiring hall referrals shall be 50-50 as between Blacks and Whites.

In *Carter* v. *Gallagher, supra*, 452 F.2d at 331, the Eighth Circuit, sitting en banc, noted this Court's approval of mathematical ratios as starting points in shaping appropriate remedies in school desegregation cases. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971). But *Swann* goes further. It also holds that school authorities have broad authority to formulate educational policy and may prescribe a ratio of Black to White students in each school to reflect the racial proportion in the school district as a whole, in order to prepare students to live in a pluralistic society. In this respect, the broad discretionary powers of school authorities exceed the authority of a federal court, which may not order ratios absent a finding of a constitutional violation. 402 U.S. at 16. It would seem that similar broad discretion should vest in labor organizations to assure equal participation by all races in employment opportunities, provided they truly reflect the composition of the relevant labor force. At least no court has previously held otherwise, so far as petitioners are aware.

proceedings were under foot by the parties to design a massive reorganization of the hiring hall and seniority systems in all the ports of the Texas Gulf Coast.

In the same interlocutory decree, the District Court has determined, at least tentatively, that full compliance with Title VII does not require that these 37 segregated locals be merged on a port-by-port basis. It has accordingly refused at this point to enter an order finally requiring such a merger, as the Government has requested. But by retaining jurisdiction over the case during the long implementation process, the District Court has reserved its authority to enter such further and final orders—which doubtless includes the authority to enter a merger order—as might be ultimately necessary to insure full compliance with Title VII.

Notwithstanding the District Court's interlocutory determination, the Fifth Circuit held that the District Court was without discretion, in designing the remedy under § 706(g) of Title VII, to refuse to order merger in the final decree, which is yet to be entered. This petition challenges that holding of the Fifth Circuit, and also challenges the Fifth Circuit's ruling that it had jurisdiction under 28 U.S.C. § 1292(a)(1) to entertain the Government's appeal from the no-merger order on an interlocutory basis.

B. The filing of the complaint

This proceeding began in 1969, when the Attorney General filed a "pattern or practice" suit against the petitioners pursuant to § 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6.[3] The named

[3] Section 707 provides, generally, that whenever the Attorney General has reasonable cause to believe that any person or group is engaged in a "pattern or practice" of resistance to the full enjoyment of any of the Title VII rights, he may bring a civil action

defendants were the International Longshoremen's Association, its South Atlantic and Gulf Coast District, and 37 affiliated Local Unions operating along the Texas Gulf Coast. Of those Local Unions, 19 had exclusively White membership, 16 had exclusively Black membership, and 2 were composed predominantly of Mexican-American longshoremen.

The complaint alleged that these named defendants had engaged in a "pattern and practice" of resistance to enjoyment of equal employment opportunities by maintaining Local Unions, hiring halls and gangs that were classified and segregated on grounds of race or national origin. The maintenance of such segregated operations was alleged to deny equal work opportunities to Black and Mexican-American longshoremen on the basis of their race or national origin, and to cause employers to discriminate on the grounds of race or national origin.

The complaint of the United States sought, *inter alia*, injunctive relief enjoining the defendants from maintaining separate Local Unions, hiring halls and gangs on the basis of race or national origin. App. 11-13. Specifically, as to the segregated locals, the complaint prayed that "the defendants be enjoined" from "maintaining separate union locals on the basis of race, color, and national origin." App. 12. And "such additional relief as the needs of justice may require" was also

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in a federal district court "requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such patterns or practice, as he deems necessary to insure the full enjoyment of the rights described herein."

In 1974, the functions of the Attorney General under § 707 were transferred to the Equal Employment Opportunity Commission. The appeal in the instant case was accordingly prosecuted in the Commission's name, rather than in the name of the United States.

sought. App. 13. But in seeking such relief as to the segregated locals, the complaint contained no prayer for temporary relief by way of a restraining order or a preliminary injunction, and none was ever sought or obtained. Nor did the complaint allege any irreparable injury if temporary relief by way of merger were not granted. The complaint simply prayed, in general terms, that the defendants "be enjoined" from all the alleged discriminatory activities and practices.

C. The trial on the merits

During the course of the trial in 1970, several important facts became clear:

(1) By stipulation and evidence, the parties established that the I.L.A. in the remote past had chartered the locals in question, and had since "maintained" them, "on the basis of race," had at all times been aware of their segregated nature, and had done nothing to seek their merger or to charter integrated locals since the passage of the Civil Rights Act of 1964. See p. 29a, *infra*. However, there was little or no effort to prove an actual exclusion of anyone from membership or work, on account of race or national origin, since the effective date of the Act.

(2) All the Black union officials who testified at the trial urged the District Court not to order a merger. Their position was that,

> ". . . by having their own unions and their own union officials, [they] have been able to better themselves by being able to hold high positions in their locals, and have been recognized in the community as a separate, powerful voice for the Negro communities, and have attained for them and the Negro people of the community, a standing which they could not have otherwise attained." See p. 30a, *infra*.

(3) The trial produced no evidence whatever that any kind of racial discrimination stemmed from the collective bargaining activities of the unions. In fact, the evidence was undisputed that none of the segregated locals engaged in any kind of collective bargaining. The petitioner South Atlantic and Gulf Coast District of the I.L.A. bargains and administers uniform contracts on behalf of all the locals, and the District itself is integrated and predominantly Black.

(4) However, it was proved that the segregated locals each maintained their own hiring halls and seniority classifications. And it was from their practices in maintaining such hiring halls and classifications that various employment opportunity discriminations were found to exist, leading to the elaborate provisions in the Interlocutory Decree merging the hiring halls and mandating common seniority classifications. In addition, the evidence showed that the so-called "sister" segregated locals operating within a given port area divided the longshoremen's work opportunities on a fifty-fifty basis, regardless of the number of members in the respective locals in that area.[4] That division of work opportunities was later found to be discriminatory and illegal under Title VII, and will be supplanted by common hiring halls and seniority lists.

(5) Apart from the evidence referred to in paragraphs (3) and (4) above, there was virtually no evidence at the trial that even arguably proved that the mere existence of segregated "sister" locals, operat-

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[4] The Fifth Circuit characterized this 50-50 rule as "admittedly a progressive interracial arrangement when the unions were first chartered," an arrangement now challenged by the Government on the claim that "what was progressive many years ago has become, because of the march of law, illegal now." See p. 2a, *infra*.

ing within the same port area, was responsible for any Title VII violations. In eight of the Texas ports here involved—Houston, Beaumont, Corpus Christi, Freeport, Texas City, Port Arthur, Orange, and Port Lavaca—the Government has yet to claim, much less prove, that any discriminatory practices at those ports are ascribable "per se" to the continuing existence of segregated "sister" locals. As to the other two ports, Brownsville and Galveston, the Government did prove instances of arguably discriminatory practices that the District Court later said (see pp. 33a-35a, *infra*) were indicative of the inequities that can result from segregated locals.[5] But in each instance, the District Count found it possible to cure the inequity by means other than ordering the merger of the "sister" locals in the Brownsville and Galveston ports.

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[5] In the Port of Brownsville, the Government showed that Local No. 1367, a White local with many Mexican-American members, had been given 75 percent of the longshoremen's work opportunities, while Local No. 1368, a Black local, received only 25 percent. But the District Court's Interlocutory Decree, solved this problem not by ordering a merger but by outlawing the 75-25 allocation. See p. 25a, *infra*.

In the Port of Galveston, the Government's evidence showed two such discriminatory effects of segregation. The first involved Local No. 1576, a Mexican-American local, whose members were limited by the local's charter to work on bananas and green fruit, a problem solved by ordering the merger of hiring halls. See p. 16a, *infra*.

The second Galveston problem involved an I.L.A. restriction on the members of Local No. 329, a Black local. They were allowed to work for only four stevedoring companies, whose work had been dwindling. The District Court solved this problem by outlawing any limitation on the number of companies for which they might work. See p. 25a, *infra*.

D. Determinations of the District Court

The critical findings of fact and conclusions of law, from which this appeal ultimately sprang, are to be found in the District Court's memorandum opinion of November 12, 1971. Appendix C hereto, p. 26a, *infra*. That memorandum opinion was the genesis of the Interlocutory Decree of October 1, 1973, including the initial portion of the decree that "hereby denied" the Government's request that all the segregated "sister" locals be merged.

The memorandum opinion squarely addressed itself to the Government's basic contention in this case "that the very existence of segregated locals is a 'per se' violation of Title VII of the Civil Rights Act of 1964." See p. 32a, *infra*. If that argument were accepted, said the court, "there the matter ends" and the merger of *all* segregated "sister" locals in the ten Texas ports would have to be ordered. See p. 33a, *infra*. But the court declared its disbelief "that it was the intention of Congress to condemn all segregated locals," and ruled that the Government "must still show that the maintenance of segregated locals constitutes a pattern or practice depriving individuals of working opportunities, because of their race or national origin." See p. 33a, *infra*.

The memorandum opinion then declared, in a passage that caused confusion and uncertainty on the appeal to the Fifth Circuit, that "the Government has discharged this burden" of proving that the maintenance of segregated locals constituted in this case a pattern or practice that deprived individuals of work opportunities. See p. 33a, *infra*. But the Court's documentation of that declaration referred simply to

the three discriminatory incidents in the Brownsville and Galveston ports (see p. 12, note 5, *supra*). And while the court labelled these incidents as indicative of the evils that can result from segregated locals, the court apparently did not deem them to be sufficient to warrant ordering the merger of the "sister" locals in Brownsville and Galveston, let alone in the other eight port cities where no such incidents occurred. The court's actual treatment of these three minor incidents was to outlaw their continuance by other commands in the Interlocutory Decree, while denying *in toto* the Government's request that all the "sister" locals be merged.

The District Court's "basic finding," as stated in its memorandum opinion, was that

> ". . . the Defendants have chartered and still maintain locals on a segregated basis, that the prevailing rule of dividing the work fifty-fifty between the White and Negro locals violates Title VII of the Civil Rights Act of 1964, because it deprives longshoremen, be they Black or White, Anglo, Mexican-American or Negro, equal working opportunities depending on which group is in the majority in the different ports, and that this will be a continuing violation in the future." See pp. 35a-36a, *infra*.

Summarizing the findings of discrimination in the memorandum opinion and the respective corrective decrees in the interlocutory order produces the following:

Memorandum findings	*Interlocutory corrections*
1. A discriminatory but localized situation at Brownsville, involving a 75-25 work division between locals, that followed the original opening of the port in recent years.	1. The 75-25 division was declared unlawful and must cease. See p. 24a, *infra*. All locals in Brownsville shall merge their hiring halls and seniority lists. See p. 16a, *infra*.
2. Two discriminatory situations in Galveston, resulting from the chartering of one local to handle exclusively but only bananas and green fruit, and the chartering of another local to handle exclusively but only the work for four specific stevedoring companies.	2. In Galveston, all work jurisdiction restrictions are abolished, and no longshoremen shall be limited as to the stevedoring companies for which work may be performed. See p. 24a, *infra*. All locals in Galveston shall merge their hiring halls and seniority lists. See p. 16a, *infra*.
3. The "basic finding" that the 50-50 division of work discriminates against one race or the other, depending upon which group is in the majority in a given port.	3. On a port-by-port basis, all locals performing the same kind of work (e.g., loading or unloading vessels, and warehouse work) shall merge their hiring halls and seniority lists, thereby eliminating the 50-50 rule.

Since there was no evidence or finding as to discriminatory employment practices ascribable to the maintenance of segregated locals in the eight Texas ports

other than Brownsville and Galveston, the District Court had no occasion to frame any corrective orders with respect to those eight non-existent situations. The decree as to the establishment of common hiring halls and seniority lists, of course, applied to all ten Texas ports.

E. Determinations of the Fifth Circuit

The special concurring opinion of Judges Thornberry and Godbold constituted the prevailing view of the Fifth Circuit on the merger issue. In their view, "the merits of this case can be decided without holding that segregated locals constitute a per se violation of Title VII." See p. 14a, *infra*.

This prevailing opinion holds that once the District Court made a finding that the Government had discharged its burden of showing that the maintenance of segregated locals constitutes a pattern or practice of depriving individuals of work opportunities because of their race or national origin, it was left with "no discretion to refuse merger." See p. 14a, *infra*. Citing the Fifth Circuit's prior ruling in *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 457 (5th Cir. 1971), Judges Thornberry and Godbold concluded that "merger of segregated locals [is] mandatory whenever they are shown to have had actual discriminatory effect on employment opportunities." See p. 14a, *infra*.

This opinion, however, makes no reference to the District Court's determination that the discriminatory practices that did exist could be "fully corrected" by the various alternative remedies specified in the interlocutory decree. It makes no effort to evaluate the

remedial provisions of that decree, singly or collectively, or to compare them to the adjudged specifics of discrimination. Without even suggesting that those remedial provisions might be inadequate, the opinion gives no recognition to the discretionary power resident in the District Court to choose or reject particular remedies in accord with the purposes of Title VII. Nor is there any acknowledgment that, under the terms of the interlocutory decree, the specified remedies were themselves subject to revision or expansion before final judgment, as might be necessary to insure full compliance with Title VII, including even a reconsideration of the merger ruling should the alternative remedies prove unsuccessful. The prevailing opinion, in other words, is content to rely upon a District Court finding as to discriminatory employment practices that was clearly limited to three relatively inconsequential practices in the Brownsville and Galveston ports, which practices were specifically enjoined in the interlocutory decree. On the basis of that limited finding, the prevailing opinion has ordered a merger of all segregated locals in all ten Texas ports.

While Judge Goldberg authored the court's opinion on the factual and jurisdictional aspects of the appeal, he wrote for himself alone in discussing the "per se" illegality of segregated locals. See Parts III and IV of his opinion, pp. 7a-14a, *infra*. He stated that, "even granting that present longshoremen, whether black or white, are paid the same wages, have equal numbers of representatives on the contract negotiating committee, and, under a common seniority and hiring hall system, could be assured of an equal chance of obtaining longshore work," the unions cannot make a show-

ing that their "organizational structure would not *tend* to deprive any *individual* of employment *opportunities* or affect his status as an employee." See p. 8a, *infra.*

Judge Goldberg disregarded entirely the scope and effect of the alternative remedies contained in the interlocutory decree. He concluded, instead, that the "segregated unions that we have before us, by their very nature, deny equal employment opportunities and conditions because of the psychological harm they inflict." He deemed the very existence of segregated locals to be a "per se" violation of Title VII, a provision which "cannot be satisfied in the present case by measures short of the merger in each particular port of the racially segregated locals within that port." See pp. 13a-14a, *infra.*

In sum, all three judges of the court below made the ultimate determination that the District Court was without discretion to refuse the merger of all the segregated locals in the ten Texas Gulf Coast ports.

F. The interlocutory appeal under § 1292(a)(1)

In its 1971 memorandum opinion, the District Court had expressed doubt as to whether "it was the intention of Congress to condemn all segregated locals" (p. 33a, *infra*), and thus whether the United States was entitled to a broad decree merging all the segregated locals in this case. The District Court sought to resolve that doubt by certifying the propriety of such relief as a controlling legal question eligible for an interlocutory appeal under 28 U.S.C. § 1292(b). See p. 37a, *infra.* But the United States, in the belief that § 1292(b) did

not provide a "valid" basis for appeal, chose not to prosecute such an interlocutory appeal.[6]

Throughout the following year the parties sought to draft a decree, but without success. Finally, on November 6, 1972, the United States moved for entry of "a final Decree in accordance with the Opinion of the Court dated November 12, 1971." See p. 38a, *infra*. The District Court responded by entering an "Interlocutory Decree" on October 1, 1973, based upon its 1971 memorandum opinion. Appendix B hereto, p. 15a, *infra*. The opening paragraph of that interlocutory decree stated that

> 1. The defendant unions "are not required to merge in order to achieve full compliance with Title VII of the Civil Rights Act of 1964 and therefore such relief is hereby denied."
>
> 2. Any violation of Title VII "can be fully corrected by the abolishment of separate hiring halls and the establishment of a common hiring hall on a port by port basis for each defendant local union which does the same kind of work, as herein set forth, within a period of ninety (90) days from a final Order [to be] entered herein."

The interlocutory decree then outlined in detail the steps to be taken to establish common hiring halls and common seniority lists. An Arbitrator was appointed

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[6] In a memorandum submitted to the Fifth Circuit, Government counsel explained the failure to pursue the § 1292(b) appeal as follows (p. 3 of memorandum):

> "The United States subsequently determined that 1292(b) would not provide a valid basis for appeal, since that provision applies only to 'an order not otherwise appealable', and no order, final or otherwise, had been entered by the district court."

to assist the local unions and their representatives on a Review Committee in implementing these hiring hall and seniority amalgamations. And the District Court expressly retained jurisdiction to issue any additional orders, including a final decree, that might be necessary to insure equal employment opportunities as defined in Title VII. See p. 26a, *infra*.

Amid the ensuing efforts by the parties to implement the orders in the interlocutory decree, the Government noted an appeal under the Interlocutory Appeals Act, 28 U.S.C. § 1292(a)(1), from that portion of the opening paragraph of the interlocutory decree which "hereby denied" the relief sought by the United States respecting the merger of all the segregated locals in the ten Texas ports. Section 1292(a)(1) permits appeals from interlocutory orders granting or refusing "injunctions."

In this case, the United States at no time requested a preliminary injunction or restraining order with reference to the merger request. Nor has the Government ever claimed that any Title VII rights might be lost if the merger request were to await the framing of the final decree. The Government simply wants, and the Fifth Circuit has granted, an immediate advance adjudication that the final decree shall contain a provision ordering the merger of all the segregated locals in the ten Texas ports. That adjudication has thus been made long before the parties and the District Court can determine if the alternative remedies, specified in the interlocutory decree, will eliminate what the District Court found to be the Title VII violations.

REASONS FOR GRANTING THE WRIT

The judgment of the Fifth Circuit, despite the division among the judges as to the basis for that judgment, raises several profound questions about the judicial implementation of Title VII of the Civil Rights Act of 1964. To what extent do federal district courts have discretion in fashioning remedies to cure inequities arising from the maintenance of segregated local unions? Does the mere maintenance of such locals, without more, constitute a "per se" violation of Title VII? And can the denial of a particular remedy be reviewed at an interlocutory stage of a prolonged Title VII proceeding?

Those are the questions of obvious national importance, fully warranting review and resolution by this Court. More particularly, the considerations that justify the grant of certiorari in the case may be stated as follows:

1. The Fifth Circuit's ruling that the District Court had no discretion to refuse to order merger of segregated locals conflicts with this Court's ruling in Albemarle Paper Co. v. Moody.

Last term, on June 25, 1975, this Court held in *Albemarle Paper Co.* v. *Moody* (Nos. 73-389 and 74-428, 43 U.S. Law Week 4880, 4883) that, in the judicial administration of Title VII of the Civil Rights Act of 1964, "backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke." Discretion, in other words, is the hallmark of the selection of remedies under Title VII, a discretion that is to be exercised consistently with, and measured by, "the purposes which inform Title VII" (43 U.S. Law Week at 4884). The Court was there referring, of course, to the discretion that permeates

§ 706(g) of the Act, 42 U.S.C. § 2000e-5(g), the very same provision utilized by the District Court in this case in refusing to order merger.[7]

The Fifth Circuit's command that the District Court must enter a merger order cannot be squared with the *Albemarle* ruling that there are no mandatory remedies under the Act. The special concurrence of Judges Thornberry and Goldbold premised the Fifth Circuit's reversal on the notion that "merger of segregated locals [is] mandatory whenever they are shown to have had actual discriminatory effect on employment opportunities," and that the District Court thus was left with "no discretion to refuse merger." See p. 14a, *infra*. And by stressing what he deemed to be the inherently or "per se" discriminatory nature of segregated locals, Judge Goldberg reached the same conclusion that the District Court lacked discretion to deny merger "in each particular port of the racially segregated locals within that port." See pp. 13a-14a, *infra*. All three judges of the Fifth Circuit thus denied the essential premise of § 706(g), as interpreted in the *Albemarle* decision, that the District Court has discretion to select or reject particular remedies in the process of eradicating Title VII violations.

The Fifth Circuit's ruling presents the conflict with *Albemarle* in a rather novel context. If, as the Fifth Circuit assumed, there be evidence that the mere main-

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[7] It bears repeating that § 706(g) states that where a respondent has intentionally engaged in an unlawful employment practice "the court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or *any other equitable relief as the court deems appropriate.*" [Emphasis added].

tenance of segregated locals has had actual discriminatory effect, does the District Court lose all of its discretion in selecting remedies to cure that particular statutory violation? The District Court in this case felt that the discriminatory effects of segregated locals can be wiped out by remedies short of merger. Is that an allowable judgment, assuming it does not constitute an abuse of discretion? If so, must the District Court also order the merger of such locals, thus eliminating what is presumably the root cause of the discrimination that has otherwise been eliminated? Must a labor organization or a corporation lose its separate identity simply because it has engaged in certain discriminatory practices that have otherwise been enjoined? The *Albemarle* decision provides no ready answer to that intriguing problem.

The Fifth Circuit's decision also seems to say that, contrary to the assumptions of the *Albemarle* decision, the discretion involved in selecting what statutory remedies to invoke is exhausted with the affirmative selections that are made, whereas there is no discretion to reject a remedy that an appellate court thinks is more appropriate. In the past, the Fifth Circuit has stressed the wide discretion of the district courts in modeling their decrees to ensure compliance with Title VII and to eliminate "the present effects of past discrimination," and it has admonished that it "will not interfere with that discretion except for an abuse thereof." *Local 53* v. *Vogler*, 407 F.2d 1047, 1052-1053 (5th Cir. 1969). But the *Local 53* case involved the imposition of a sanction that met the Fifth Circuit's approval. The implication of the instant case is that such discretion, as well as the appellate respect therefor, disappears when the district court has rejected a remedy that the Fifth Circuit deems more appropriate.

Albemarle certainly does not support such a one-sided version of the process of selecting statutory remedies.

Additionally, the decision below may reflect a disturbing tendency in the lower federal courts to consider the maintenance of segregated unions as a "per se" violation of § 703(c)(2) of Title VII and to require the merger of such unions without regard to any discretionary alternative remedies. Such, indeed, was the main argument of the Government before the Fifth Circuit in this case, augmented by the claim that—with the exception of the District Court below—every court that has considered the issue has held that "the continued maintenance of segregated local unions having the same functional jurisdiction is a violation of Title VII."[8] Most of the cases cited by the Government

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[8] The Government bluntly argued to the Fifth Circuit, Brief, p. 12, that "since the maintenance of segregated locals is itself a *per se* violation of Title VII, it follows that the district court was obliged to order that they be merged." And in support of the proposition that every court that had previously considered the issue had determined that the continued maintenance of segregated locals is a violation of Title VII, the Government cited (Brief, p. 9) the following cases.

United States v. *International Longshoremen's Association*, 460 F.2d 497 (4th Cir. 1972), cert. denied, 409 U.S. 1007 (1972);

United States v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972);

Hicks v. *Crown Zellerbach Corp.*, 310 F.Supp. 536 (E.D. La. 1970);

United States v. *Local 189, United Paperworkers and Papermakers*, 301 F.Supp. 906 (E.D. La. 1969), aff'd, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970);

Williams v. *New Orleans Steamship Assn.*, 341 F. Supp. 613 (E.D. La. 1972);

Musicians' Protective Union Local No. 274, A.F.M. v. *American Federation of Musicians*, 329 F.Supp. 1226 (E.D. Pa. 1971).

Subsequent to the filing of the Government's brief in the Fifth Circuit, the District Court for the Middle District of Louisiana, in

for that "per se" proposition can perhaps be distinguished on the ground that they involved much more blatant on-the-job inequality, traceable to the existence of segregated locals, than was found to be true in the instant case. But such factual distinctions may be insufficient to blunt the thrust of the Government's likely argument that those prior decisions, and now the Fifth Circuit's ruling in this case, impliedly if not expressly adopt the "per se" approach. And because the "per se" concept is so foreign to the discretionary notions that emerge from the *Albemarle* decision, review of the decision below becomes most appropriate.

Since the decision below, as well as the other "per se" decisions cited by the Government, was rendered prior to the entry of this Court's opinion in *Albemarle,* the appropriateness of granting certiorari to test the consistency of the notions expressed below by the Fifth Circuit with the *Albemarle* discretionary concepts is heightened. Even standing alone, the decision below has a dangerous uniqueness. It constitutes a precedent for an indiscriminate merging of multiple sets of segregated locals without regard to whatever alternative remedies a district court may have found appropriate to eradicate Title VII violations.

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reliance on the memorandum opinion of the District Court in the instant case (344 F. Supp. 976), ruled that the mere existence of two segregated locals is not per se a violation of the Civil Rights Act of 1964. *Bailey* v. *Ryan Stevedoring Co.,* 7 FEP Cases 914, 919 (M.D. La. 1974).

2. The Fifth Circuit's determination that segregated "sister" locals must be merged in all ports, even where no discriminatory effects were shown, raises an important problem in the administration of Title VII.

Judge Goldberg's opinion below openly espouses the Government's notion that the mere maintenance of segregated locals is a "per se" violation of § 703(c)(2) and that merger of those locals must be mandated on a port-by-port basis. The prevailing concurrence of Judges Thornberry and Godbold effectively, though somewhat inadvertently, reaches that same result. And thus is raised an important and unresolved problem in fashioning remedies for Title VII violations.

That the prevailing concurrence below impliedly has overtones of the "per se" approach is readily apparent: (1) the concurrence at first blush appears to be wholly premised on the District Court's specific finding that some employment discrimination resulted from the existence of segregated locals; (2) but that finding of the District Court (see pp. 12, 15, *supra*) related only to the situations in two ports, Brownsville and Galveston; and (3) thus, by indiscriminately mandating merger of segregated locals in all ten of the Texas ports, the concurrence effectively orders mergers in the eight Texas ports where the District Court found no evidence of discriminatory effects.

The immediate problem created by any "per se" approach to the segregated union problem is that it appears inconsistent with the language of § 703(c)(2) of the Act. That section does not outlaw all practices of limiting or segregating union membership; it only outlaws such of those practices "which would deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or

national origin." The Fifth Circuit's ruling in this case, at least to the extent that mergers have been mandated in the eight Texas ports where no employment discrimination was ascribed to the maintenance of segregated locals, presents this statutory problem in unavoidable form. Can the clear limiting words of § 703(c)(2), confining its impact to those situations where employment opportunities have been denied, be ignored or overcome by the theory that all segregated union situations necessarily cause or tend to cause the denial of employment opportunities?

The "per se" approach, moreover, rests in large part upon constitutional notions as to the inherent inequities of segregation. As Judge Goldberg's opinion below demonstrates, heavy reliance is placed upon the stigma and harm to one's self-esteem that a segregated organization—be it a union, a school, or a transportation system—can inflict upon excluded minority groups. *Brown* v. *Board of Education,* 347 U.S. 483 (1954), is often cited as indicative of the kinds of evils that adhere to segregated unions. But the question still remains as to the extent to which the constitutional philosophy, epitomized by *Brown* v. *Board of Education,* should control the interpretations of § 703 (c)(2) of this Act and the selection of remedies available to overcome the specific evils outlawed by Title VII. The importance of that question is underscored by the fact that not one word in the Act or its legislative history indicates an intent to eradicate any and all segregated locals on a "per se" basis, irrespective of their actual impact on discriminatory employment practices. Only this Court can give an authoritative answer to that question.

Finally, the "per se" approach elevates a unique problem in the arena of labor organizations. Is § 703 (c)(2) designed to impose merger on segregated "sister" locals irrespective of their desires to maintain their separate and legitimate organizational identities? Should a court, in weighing the alternative forms of relief, take into account not only the desires of the unions respecting merger but the actual harm that a court-ordered merger may inflict upon the unions involved?

In this case, for example, the vast majority of the affected "sister" locals have consistently opposed the Government's efforts to merge their organizations. The Black locals in particular have premised their opposition on their desire to retain in their communities a separate, powerful voice for their members, as well as for the Black communities. See p. 30a, *infra*. Such a desire reflects the fact that local unions can be something more than a labor relations representative of their members—they frequently do engage in a wide variety of other activities, "anything from social service activity on behalf of the local's membership to the maintenance of a speakers' bureau during political campaigns." 1 Kheel, Labor Law § 303[1], p. 3-14 (1975). And in the Federal Election Campaign Act of 1971, Congress gave express recognition to the right of labor organizations to communicate partisan political appeals to their members and families. See 18 U.S.C. § 610, as amended.

Those union values may be worth preserving even where a local continues to exist in segregated form, at least where, as here, all of the acknowledged evils of segregation have been exterminated by other means.

And in this case, the locals have been left with little more than these extra-labor activities to perform, having been shorn of their roles in collective bargaining, hiring halls and seniority matters.

The puzzling and ultimate question in this case thus emerges. What assurance is there, from the action of the Fifth Circuit, that the indiscriminate or "per se" order of merger is the product of a careful weighing of competing legitimate values? What assurance is there, indeed, that the merger order will accomplish any of the objectives of Title VII? The District Court here found that the actual instances of discriminatory employment practices can be eliminated as specified in its interlocutory order, a finding which the Fifth Circuit did not dispute. What objective is thus left to the merger requirement? What assurance is there that the merged locals will necessarily remove the stains of discriminatory employment practices that may or may not remain in the Texas ports?

The localized situations at Brownsville and Galveston apart, it is indeed evident that the petitioning unions, as they now exist, have provided a superior protection of working opportunities for minority longshoremen, as well as a harmonious balance between races and groups in access to identical jobs and wages. Small wonder, then, that they resist the dismantling of their organizational structure in favor of a system which may theoretically be racially neutral but which has produced so many other proven cases of discrimination in employment. It is an enormous assumption, and one that Congress did not make, that merger will improve and not harm the lot of these longshoremen.

3. An important problem is raised by the Fifth Circuit's assertion of appeal jurisdiction under 28 U.S.C. § 1292(a)(1)

The Fifth Circuit's ruling that § 1292(a)(1) authorized an appeal from the District Court's interlocutory denial of the requested merger "relief" has extended the area of confusion and conflict among the Circuits as to the necessary predicates of such a § 1292 (a)(1) appeal. It must be classified as one of those questionable "*ad hoc* decisions [that] disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money." *Baltimore Contractors* v. *Bodinger,* 348 U.S. 176, 181 (1955). As such, that decision should be reviewed by this Court to insure that "no unauthorizd extension or reduction of jurisdiction, direct or indirect, occurs in the federal system." *Ibid; Shanferoke Corp.* v. *Westchester Corp.,* 293 U.S. 449, 451 (1935).

There can be no quarrel with the assumption of the Fifth Circuit that the denial of the requested merger "relief" was a denial of the request for a permanent injunction, as sought in the complaint. See *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 541, n.5 (1972). And it is true that the refusal of an "injunction," within the meaning of the interlocutory appeal allowed by § 1292(a)(1), may "at times embrace denials of permanent injunctions." *Switzerland Cheese Assn.* v. *Horne's Market,* 385 U.S. 23, 25 (1966). See also *Goldstein* v. *Cox,* 396 U.S. 471, 475, n.2 (1970).

But what has not been clear to the courts of appeals is the extent to which § 1292(a)(1) is limited to interlocutory challenges to orders "of serious, perhaps irreparable, consequence." *Baltimore Contractors* v. *Bodinger, supra,* 181. The First Circuit has insisted,

for example, that such an appeal must be dismissed unless the appellant demonstrates that a refusal to accept the appeal from the lower court order would on balance have such a "serious, perhaps irreparable, consequence." *New England Power Co.* v. *Asiatic Petroleum Corp.*, 456 F.2d 183, 186-187 (1st Cir. 1972). On the other hand, a badly divided Second Circuit has ruled that such an appeal may be entertained without such a showing of irreparable injury. *Abercrombie & Fitch Co.* v. *Hunting World, Inc.*, 461 F.2d 1040, 1041-1042 (2d Cir. 1972); but see Judge Fineburg's dissent at 1044-1045. See also *Western Geophysical Co. of America* v. *Bolt Associates, Inc.*, 440 F.2d 765, 770-771, n. 4 (2d Cir. 1971), where Judge Friendly suggested that "further consideration" should be given this § 1292(a)(1) question.

Citing the *Baltimore Contractors* decision of this Court, the Fifth Circuit here has said that "the potential for irrecompensible injury . . . is just as likely to be present when an injunction is denied or granted for a time period extending beyond the final order in the trial." See p. 7a, *infra*. That statement may be true. But what is significant in the Fifth Circuit's action is its utter failure to require that the § 1292(a)(1) appeal be premised on proof by the Government that the denial of the merger relief somehow permanently or irremedially injured the Government's claims respecting merger, or caused some form of actual job loss or ongoing discrimination. By that failure, the Fifth Circuit has added to the confusion and conflict surrounding § 1292(a)(1), as to the impact thereon of the "serious, perhaps irreparable, consequence" language in this Court's *Baltimore Contractors* opinion.

The Fifth Circuit's confusing contribution to the § 1292(a)(1) jurisprudence, moreover, has been made in a case where the Government has never claimed, much less proved, that a merger order was urgently needed prior to the District Court's final decree, which is yet to come. There has been no claim that an immediate merger is necessary during the pendency of the District Court proceedings because the continued segregation of the "sister" locals has an immediate and discriminating impact on employment opportunities that cannot otherwise be cured by the interlocutory decree. Nor has there been any claim that the merger relief cannot be revived and imposed at the end of the District Court proceedings should the interlocutory decree not achieve its goal of eradicating all the Title VII violations.

The Fifth Circuit, adopting the Government's arguments, has simply utilized § 1292(a)(1) as a vehicle for precipitously overruling a preliminary and discretionary denial of one kind of requested relief. It has done so during a most delicate stage of an ongoing District Court proceeding designed to eliminate, under court supervision, all the Title VII evils to which the Government objected. The Fifth Circuit has done all of this without once acknowledging the discretionary and interlocutory considerations underlying the District Court's denial of merger "relief," and without once insisting that the Government show any equitable or factual reason why an appeal must now be had under § 1292(a)(1).

Indeed, the Fifth Circuit's comment (see p. 7a, *infra*) that in this case "the question of the appropriate remedy is itself a matter of law" reveals how far the Fifth Circuit has strayed from the equitable considerations

that affect both the selection of remedies (*Albemarle Paper Co.* v. *Moody, supra*) and the entertainment of § 1292(a)(1) appeals (*Baltimore Contractors* v. *Bodinger, supra*).

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit in this proceeding.

Respectfully submitted,

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September 5, 1975.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

No. 74-1053.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

INTERNATIOAL LONGSHOREMEN'S ASSOCIATION et al.,
Defendants-Appellees.

April 11, 1975.

(511 F.2d 273)

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, GOLDBERG and GODBOLD, Circuit Judges.

GOLDBERG, Circuit Judge:

This suit poses for us, in the year 1975, the question of the legality of maintaining segregated black and white unions. Workers in these unions perform the same basic functions, for the same bosses, in the same ports but do so out of different locals. Defendants claim that this division is no more than an amenity for those who wish to associate with "their own". We believe that the effect, if not the intention, is far more invidious, in that it denies equal opportunities to workers and potential workers, and is thus in violation of 42 U.S.C. § 2000e et seq.

The defendants in this suit are the International Longshoremen's Association, the South Atlantic and Gulf Coast District of the Association and 37 local unions within the State of Texas which are chartered by the Association. Save for one of the locals, all, whether black or white, are

opposed to a merger with their "sister" unions within each port.[1]

All of the locals involved in this suit were chartered before the passage of Title VII, the Civil Rights Act of 1964.[2] The unions have had what was admittedly a progressive interracial arrangement when the unions were first chartered. In most of the ports the work was divided on a 50%-50% basis between the black and white locals. There were no wage differentials between those in the white and those in the black locals. The defendants contend, and the plaintiff, the Equal Employment Opportunity Commission, does not dispute, that the union committee, which bargains with the shippers for the labor agreements which control the Texas ports, is made up equally of black and white members. Finally, while in some of the ports the mean take home pay for a white longshoreman is higher than that for a black longshoreman, this is at least in part a function of the fact that black locals have chosen in their own discretion to confer seniority and therefore job eligibility on more men by employing laxer standards.

Nonetheless, the United States in 1969 brought suit,[3] claiming that what was progressive many years ago has become, because of the march of law, illegal now.

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[1] Local 1368, in Brownsville, Texas, is made up mostly of blacks with some Mexican-Americans. Brownsville appears to be a special case, in which this union local receives only 25% of the work. It appeals for a "fair share" for its members by whatever means necessary and does not necessarily oppose merger of locals.

[2] 42 U.S.C. § 2000e et seq.

[3] The suit was originally brought by the Attorney General under 42 U.S.C. § 2000e-6(a), which gave him jurisdiction when he had reasonable cause to believe that a person or group of persons were engaged in a pattern or practice of resistance to the enjoyment of any of the rights secured by the Act. Effective as of March, 1974, this jurisdiction was transferred to the Equal Employment Opportunity Commission by 42 U.S.C. § 2000e-6(c); § 2000e-6(d) continued without abatement all suits brought by the Attorney General by substituting the Commission as the party.

I

Facts

The Government's suit claimed that the pattern of union organization violated 42 U.S.C. § 2000e-2(c)(2), which says that it will be an unlawful employment practice for any labor organization:

> [T]o limit, segregate, or classify its membership or applicants for membership or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities . . . or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin.

The plaintiff asked the district court to hold that segregated unions are, per se, a violation of the statute and therefore to order that the paired local unions be merged. The defendants essentially argued that no economic deprivation resulted from the existence of separate locals and therefore that their organizational structure did not violate the law.

In his opinion, United States v. Int'l Longshoremen's Ass'n, S.D.Tex.1971, 334 F.Supp. 976, the district judge found that the maintenance of completely separate unions would, in fact, tend to deprive individuals of employment on the basis of their race. Judge Garza decided that while the 50%-50% rule had the superficial look of equality, in fact it had discriminatory potential:

> If in any port there are one hundred Whites available to work on the waterfront as longshoremen and two hundred Negroes, and the work is divided fifty-fifty it is obvious that the one hundred Whites will work more hours than the Negroes. . . .

> It is not the racial composition of the community that should control, but the number of Blacks and Whites that make themselves available for longshore work that counts.

334 F.Supp. at 979. However, he declined to find that segregated unions in themselves were in violation of the Civil Rights Act of 1964 and stated that he thought he could shape a decree short of merger which would remedy the economic deprivation. He held the formulation of a decree in abeyance, however, and certified to this Court, under 28 U.S.C. § 1292(b), the question of whether the segregated locals had to be merged.[4]

For reasons known only to it, or perhaps for no reason at all, the plaintiff did not take an appeal but decided instead to enter into negotiations with the unions, still, apparently, maintaining its "merge or no deal" approach throughout. This approach did not result in a resolution of the issues, and on November 6, 1972, a year after Judge Garza entered his first order, the Government made a motion for entry of judgment. In its Memorandum in Support of Plaintiff's Motion for Entry of Judgment, the Government said: "We believe that an Order should be entered requiring merger in the manner suggested by our Proposed Decree, and also requiring the other elements of relief contained in that proposal." A year after this motion on October 1, 1973, the district court entered an Interlocutory

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[4] 28 U.S.C. § 1292(b) reads, in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: . . .

Decree which held that the defendants were not required to merge and that "therefore such relief is hereby denied;" and proceeded to hold that the violations of Title VII of the Civil Rights Act of 1964 "can be fully corrected by the abolishment of separate hiring halls and the establishment of a common hiring hall" and by the establishment of common seniority classifications. The Equal Employment Opportunity Commission appeals from this Interlocutory Order.

II

Jurisdiction

A panel of this Court denied appellee's motion to dismiss the appeal on February 12, 1974. We agree with that panel's action and believe that the appeal is correctly before this Court.[5] The jurisdictional posture of this case is a peculiar one. The district court's order is definitely interlocutory in nature. It orders the parties to confer in establishing common seniority systems and hiring halls and to submit a plan back to the district court so that it can entertain objections. The order goes on to state that the district court is retaining jurisdiction in the matter with "full power and authority to issue any additional Orders

[5] Indeed, it might appear that once a panel of this Court had made a legal determination that jurisdiction exists, no subsequent panel on its own could make a contrary determination. Rather the original panel's action would appear, at the least, the law of the case, and could not be overruled except by this Court sitting en banc. Nonetheless, this Court has held that the panel deciding the case must make a de novo determination of jurisdiction. We have said: "Although motions to dismiss have been denied under our administrative procedures, the Court of Appeals is not precluded from a further inquiry as to its jurisdiction and is not relieved of the duty to dismiss the appeal if it appears there is no jurisdiction." Austracan, Inc. v. M/V Lemoncore, 5 Cir. 1974, 500 F.2d 237 at 239; *see also* Cook v. Eizenman, 5 Cir. 1963, 312 F.2d 134 at 136. Thus we must make the independent inquiry above.

necessary to insure equal employment opportunities. . . ." In so ordering, however, the judge denied the plaintiff's motion for a permanent injunction merging the locals.

28 U.S.C. § 1292(a)(1) provides in relevant part that the courts of appeals shall have jurisdiction of appeals from "interlocutory orders of the district courts of the United States, . . . granting(,) . . . refusing or dissolving injunctions. . . ." In a number of cases we have upheld the appealability of denials of preliminary injunctions. *See, e.g.,* Mercury Motor Express, Inc. v. Brinke, 5 Cir. 1973, 475 F.2d 1086; Southeastern Promotions, Ltd. v. City of Mobile, 5 Cir. 1972, 457 F.2d 340; Smith v. Grady, 5 Cir. 1969, 411 F.2d 181; Dilworth v. Riner, 5 Cir. 1965, 343 F.2d 226; Bd. of Pub. Instr. v. Braxton, 5 Cir. 1964, 326 F.2d 616.

The only jurisdictional question in the present case is whether § 1292(a)(1) applies to give us jurisdiction of denials of permanent injunctions. We conclude that it does. In Ferrara v. Louisiana, 5 Cir. 1971, 443 F.2d 344, while recognizing our lack of jurisdiction we said ". . . [W]e concede that the denial of a preliminary or permanent injunction is appealable, . . ." and go on to decide the case by noting "But the critical fact is that plaintiffs in the proceedings on defendants' motions to dismiss merely opposed those motions and did not ask for a preliminary injunction, much less a permanent one." 443 F.2d at 345, 346. Though dicta, *Ferrara's* language traces the correct path.

First, we note that in granting the jurisdiction to hear an appeal from the denial of an injunction, the statute draws no distinction based upon the type of injunction which a party has requested. Second, to the extent that jurisdiction over only certain interlocutory orders—those involving injunctions—has been granted in furtherance of the general policy against piecemeal appeals, *see* Andrews v. United States, 1963, 373 U.S. 334, 83 S.Ct. 1236, 10 L.Ed.2d 383, that purpose is as well, or better served, in the adjudi-

cation of motion for a permanent rather than a preliminary injunction. In many cases issues will be finally resolved by the grant or denial of a permanent injunction, while no such resolution will stem from a decision on a motion for a preliminary injunction. This will be the case when, as in the present situation, the question of the appropriate remedy is itself a matter of law. Finally, the factor which singles out injunctions as those matters which will be appealable from an interlocutory order, the potential for irrecompensible injury, Di Bella v. United States, 1962, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614; Baltimore Contractors, Inc. v. Bodinger, 1955, 348 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233, is just as likely to be present when an injunction is denied or granted for a time period extending beyond the final order in the trial. These considerations compel the conclusion that the appeal at bar is properly before us.[6]

III

Merits

In United States v. Jacksonville Terminal Co., 5 Cir. 1971, 451 F.2d 418, we gave comprehensive attention to the evidentiary issues surrounding a showing of discrimination. That opinion dealt in part with the interpretation of section 2000e-2(c)(2), noting that "there appears no valid justification for preservation of these local as separate entities. The record clearly discloses that the existence of 'separate but equal' locals has had, and may continue to

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[6] We note that dicta in the Supreme Court's opinion in Switzerland Cheese Ass'n v. Horne's Mkt., 1966, 385 U.S. 23, 87 S.Ct. 193, 17 L.Ed.2d 23, is consistent with our conclusion. The Court said: "We take the other view [that the petitioner could not appeal] not because 'interlocutory' or preliminary may not at times embrace denials of permanent injunctions, but for the reason that the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim." 385 U.S. at 25, 87 S.Ct. at 195, 17 L.Ed.2d at 25.

have, post-Act deleterious effects on blacks." 451 F.2d at 457. We ordered the merger of segregated unions, but in doing so did not need to inquire further into the meaning of the statute before us.[7]

Reading § 2000e-2(c)(2) by its literal terms, as we ordinarily do, Perry v. Commerce Loan Co., 1966, 383 U.S. 392, 400, 86 S.Ct. 852, 857, 15 L.Ed.2d 827, 833; Mumford v. Glover, 5 Cir. 1974, 503 F.2d 878 at 882, I believe that the statute puts an extremely heavy burden on those who wish to maintain segregated unions. They must show that this organizational structure would not *tend* to deprive any *individual* of employment *opportunities* or affect his status as an employee.

I conclude that the unions cannot make such a showing, even granting that present longshoremen, whether black or white, are paid the same wages, have equal numbers of representatives on the contract negotiating committee, and, under a common seniority and hiring hall system, could be assured of an equal chance of obtaining longshore work. There are two reasons for this decision. First, black individuals who might potentially seek employment opportunities as longshoremen would tend to be dissuaded by the onus they would then have to bear of working through an involuntarily all-black organization.[8] Second,

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[7] The Court was not presented with motions for remedies short of merger and did not directly deal with the validity of such remedies.

[8] The defendants note that there is no requirement within the rules which govern the locals that each local may service only members of its predominant race. But they admit that the locals wer chartered on the basis of race, and have been maintained on that basis. As the district court found, the exceptions to this pattern "have been few and far between". 334 F.Supp. at 978. They are functionally segregated; neither this Court nor the statute we are applying would force blacks to undergo the tension and tribulations of joining the predominantly white local before we decide the case.

there is a significant likelihood that the contracts which would emerge from bargaining sessions in which all of labor's representatives were charged with serving all of the employees would better the employment status of present and potential black employees than does a bargaining committee in which half of the representatives are charged with serving white employees and the other half with serving black employees.

A. *Stigma*

In Brown v. Board of Educ., 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, in which the Supreme Court held that segregated schools denied to blacks the equal protection guaranteed by the Fourteenth Amendment, the Court said: "To separate [black school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494, 74 S.Ct. at 691, 98 L.Ed. at 880. The Court then quoted from the lower court in one of the cases consolidated in *Brown*: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." *Id.* The Supreme Court found that regardless of the equality of the material inputs, segregated schools could not be equal because the very segregation causes psychic trauma to the black children.

The racial stigma which prevents segregated schools from offering equal educational opportunities is not felt exclusively by children, nor is it felt exclusively in the educational context. The Supreme Court subsequently summarily decided a series of cases in which it held that racially separate facilities were inherently unconstitutional; the

Court came to those decisions without regard to any evidence of material equality. See, e.g., New Orleans City Park Improvement Ass'n v. Detiege, 1958, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46, aff'g 5 Cir. 1958, 252 F.2d 122 (segregated parks). Gayle v. Browder, 1956, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114, aff'g Browder v. Gayle, M.D.Ala. 1956, 142 F.Supp 707 (segregated sectioning of buses); Mayor and City Council of Baltimore v. Dawson, 1955, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774, aff'g Dawson v. Mayor and City Council of Baltimore, 4 Cir. 1955, 220 F.2d 386 (segregated beaches).

We must address ourselves to the terms of § 2000e—2(c)(2) in light of this judicial recognition of the harm to self-esteem that attaches to many black persons at the prospect of obtaining their goal through an involuntarily segregated mechanism—whether that goal be education, transportation, recreation or, in the present case, employment. Once we do so it becomes apparent to me why the segregated locals currently before us must be merged. The statute says that any segregation which tends to deprive an individual of employment opportunities is illegal. Many black people who are about to embark upon a career will be dissuaded from becoming longshoremen because of the extra burden which attaches to that profession in the form of the psychic discomfort of segregation. That extra obstacle, in other words, tends to deprive them of their opportunity to become longshoremen. It does not matter that many of the blacks currently in the segregated local have come to regard it as a voice of the black community. The effect of such segregation is likely to be viewed as a negative one by many blacks considering potential jobs and so long as one black so views it, the result of the practice is discrimination. Nor does it matter that those who continue the system may not have a discriminatory intent. The statute which we are construing calls for a finding of illegitimacy where the classification tends to effect a denigration of employment opportunities. It does not look to

the intention of those who segregate nor to the satisfaction with which they may view the job they have done.

B. *Negotiations*

The other detriment which blacks will tend to suffer relates to the adverse effect upon their employment status and employment opportunities of the contractual terms which emerge from bargaining sessions in which only some of labor's negotiators are charged with representing their point of view. The problem is well expressed in an analogous case to the present one, faced by the Fourth Circuit:

> Abolition of the dual hiring halls and the other reforms decreed by the district court do not eliminate the necessity of merging the locals. The ILA's failure to secure equal employment opportunities for its black members in all jobs for which they are qualified is an example of the inherent inequality that the district judge correctly concluded can be remedied only by merger. Apart from further litigation, discrimination against black workers who aspire to non-gang jobs, such as gearmen, mechanics, and foremen, can only be accomplished by bargaining with the stevedores. But the officers of the white local owe no duty to the members of the black local, and it is unrealistic to expect them to participate in hard bargaining on behalf of black longshoremen. . . . At best, the union's committee approaches the bargaining table with divided legal responsibilities and loyalties. However, merger of the locals will place on all bargaining representatives, not just black bargaining representatives, the statutory duty to eliminate racial discrimination throughout the Port. Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 203, 65 S.Ct. 226, 89 L.Ed. 173 (1944).

United States v. Int'l Longshoremen's Ass'n, Cir. 1972, 460 F.2d 497 at 501. This reasoning is as relevant in our

case as it was in the case before the Fourth Circuit. As Judge Garza noted below:

> Much of this disparity [in total earnings by locals] is due to the earnings of individual workers on the waterfront who are members of the locals, but who are hired directly by the employers, and who are not referred by the locals, most of whom are Whites, such as the so-called Gearmen. This situation has been known for a long time, and yet the contracts entered into by and between the industry and the longshoremen have not attempted to correct this situation.

334 F.Supp. at 979.

I believe that this type of discrimination is more likely to be overcome when all of labor's negotiators have the statutory duty to oppose it, as compared to the case when only some will oppose it and others will be willing, at least, to tolerate the discrimination in return for other types of benefits.[9]

Moreover, merger eliminates the possibility of internecine strife between the segregated unions either in the negotiation process or in other phases of union activity. For, where different unions have different interests we cannot be assured of continuing amicable relations. I read another salutary effect of this construction of the statute to be the prevention of any such interunion carnage under black and white flags.

IV

Conclusion

Plessy v. Ferguson, 1896, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, with all of its "separate but equal" paraphernalia

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[9] In addition, there are, of course, multifarious aspects of the contract negotiation process whose resolution may differently affect a black employee's status depending on the duties and directions of the negotiators.

nalia has failed the constitutional test of time for a good reason. The involuntary separation of people engenders a psychological harm which puts the lie to contentions of equality. It is ludicrous to say in the seventh decade of the twentieth century, 20 years after Brown v. Board of Education gave us our forceful education in race relations, as our society and courts have struggled with the great task of cleansing the vicious inequities which have beset our black citizens, that segregated unionism is to receive the statutory or constitutional blessing of our Congress or this Court. Congress would be shocked to hear that their legislation entrenches the inequality *inherent* in segregated locals. And I would not undo twenty years of judicial travail to allow that same result. Unions are not entitled to any separate enclave in our legal and sociological stratification. A union is not a social club; it is a fundamental economic instrument in our society and we have a whole body of law regulating it. The statute we have under consideration is addressed to the potential employment of every citizen as well to post-employment conditions. The segregated unions that we have before us, by their very nature, deny equal employment opportunities and conditions because of the psychological harm they inflict. This is an intolerable situation. Congress designed the statute we have before us to abrogate racism and does not allow us to sanctify segregated unions when they perpetuate unequal effects. It may cost some money to merge these unions; there may be some disruption in activities, but I would not ever condemn black workers to the Hobson's choice of living in an involuntarily black niche or foregoing employment opportunities on the waterfront.

I must conclude, then, that the district court erred when it refused to grant plaintiffs' motion for the entry of a permanent injunction against the continued operation of segregated locals. I find that the edict of 42 U.S.C. § 2000e-2(c)(2) cannot be satisfied in the present case by measures short of the merger in each particular port of the racially

segregated locals within that port. On that basis I would reverse and remand this case.

Reversed and remanded.

THORNBERRY, Circuit Judge, with whom GODBOLD, Circuit Judge, joins (specially concurring):

We concur in the court's judgment, and in Part I and II of Judge Goldberg's opinion. In our view, however, the merits of this case can be decided without holding that segregated locals constitute a per se violation of Title VII. As Judge Goldberg notes, p. 275, *ante,* the lower court here specifically found that "the Government has discharged . . . [its] burden . . . [of showing] that the maintenance of segregated locals constitutes a pattern or practice depriving individuals of working opportunities, because of their race or national origin." 334 F.Supp. at 980. In United States v. Jacksonville Terminal Co., 5 Cir. 1971, 451 F.2d 418 this court wrote:

> The record clearly discloses that the existence of 'separate but equal' locals has had, and may continue to have, post-Act deleterious effects on blacks. . . We conclude that the District Court erred in refusing to hold that the failure to consolidate the locals violates section 703(c) of the Act, 42 U.S.C.A. § 2000e-2(c).

451 F.2d at 457. We read this language to make merger of segregated locals mandatory whenever they are shown to have had actual discriminatory effect on employment opportunities. Since in this case Judge Garza found that employment discrimination resulted from the existence of segregated locals, *Jacksonville Terminal* left him no discretion to refuse merger. Hence, the order on appeal must be reversed. If a case ever comes to us with a finding by the district court that no actual employment discrimination arose from segregated locals, we may then properly consider the necessity for a rule of per se illegality. On this basis we join the court's judgment.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 69-B-3

UNITED STATES OF AMERICA, *Plaintiff*

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, *et al.*,
Defendants

Interlocutory Decree

Pursuant to the "Memorandum" of this Court, which has been entered herein and constitutes the Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED and DECREED that said defendants are not required to merge in order to achieve full compliance with Title VII of the Civil Rights Act of 1964 and therefore such relief is hereby denied; and it is further ORDERED, ADJUDGED and DECREED that any violation of Title VII of the Civil Rights Act of 1964 can be fully corrected by the abolishment of separate hiring halls and the establishment of a common hiring hall on a port by port basis for each defendant local union which does the same kind of work, as herein set forth, within a period of ninety (90) days from a final Order entered herein, as follows:

I.

Defendant Local Unions Which Must Merge Hiring Halls With Each Other

Port	*Locals to Merge Hiring Halls*
Beaumont	325, 1306 and 1610
Brownsville	1367, 1368 and 1372
Corpus Christi	1224 and 1225
Corpus Christi	1280 and 1281
Freeport	1723 and 1818
Galveston	307, 329, 851 and 1576
Houston	872 and 1273
Houston	1330 and 1331
Houston	1525 and 1581
Orange	341 and 814
Port Arthur	1029 and 1175
Port Lavaca	1758 and 1763
Texas City	636 and 991

II.

Common Seniority Classifications

During the ninety (90) days period heretofore described, the defendant local unions that are required to operate a common hiring hall shall adopt a common seniority classification and hiring hall plan and prepare a list of qualified, regular gang foremen on a port by port basis in compliance with Title VII of the Civil Rights Act of 1964 for approval by this Court, using the following standards:

1. No active longshoreman's classification shall be reduced unless it is demonstrated that he has not worked a sufficient number of years to warrant his present classification, taking into consideration the seniority system of the local and/or locals with which his local is being required to merge hiring halls, except that appropriate allowances shall be made for the prior effect of the division of the work.

2. Presently classified longshoremen have the right to request, upon a showing of good cause, that they be upgraded, which request shall be reviewed as hereinafter provided.

3. Gang members shall be referred to work on the basis of their seniority classification; that is, longshoremen with a higher seniority classification shall be offered job opportunities before longshoremen with a lower seniority classification, and not on the basis of race.

4. Gangs shall not be selected or worked on the basis of race.

5. When a gang foreman selects members of his gang, he shall make such selections offering job opportunities to longshoremen wtih the highest seniority classification and qualifications before offering such job opportunities to longshoremen with a lower seniority classification and qualifications. Qualifications shall mean the ability to perform the job, and if a longshoreman has regularly worked the job in the past he shall be deemed qualified to work the job. A rebuttable presumption of good faith on the part of the gang foreman in making job assignments shall exist.

6. All persons who were regular, active gang foremen as of January 20, 1969 or who have been approved as a regular, active gang foreman since that date shall be eligible to be included on the list of qualified, regular gang foreman, who shall be selected for such list by the Review Committee, as hereinafter provided, on a non-discriminatory basis.

7. Gang foremen shall be selected to work on the basis of their gang's accumulated earnings on a day to day basis, as indicated by a list which shall be prepared and maintained daily.

The gang foreman with the least earnings for his gang shall be selected first to carry a gang.

Nothing in the preceding paragraph shall prejudice any gang foreman from being referred to work, other than in the capacity of gang foreman, in line with his seniority classification.

8. Each Seniority System in each Port shall contain a non-discriminatory provision relating to the requirements that must be met in order to gain future (or additional) seniority or to maintain existing seniority classifications. Each longshoreman shall be reclassified on an annual basis within sixty (60) days following receipt of the work records from the ILA Welfare, Vacation and Pension Records for the preceding year, if he is entitled to be reclassified. The Review Committee, hereinafter provided for, shall constitute the committee to make such annual reclassifications.

9. One representative from each defendant local union which is required under this Order to merge hiring halls shall constitute a Review Committee to hear any grievance of any individual longshoreman that he has been improperly classified or that he has been improperly referred to work in violation of the common hiring hall plan and/or the final Order of this Court.

10. All defendant local unions shall file with the Clerk of this Court a full and complete report showing the common Seniority System and Hiring Hall Plan adopted by them pursuant to this Order and disclose the classification of each individual longshoreman by name. The plaintiff herein, or any local union and any individual longshoreman is granted leave to file in this Court any objections to the common Seniority System and Hiring Hall Plan within sixty (60) days after the filing of such report which related to him.

III.

Common Seniority System and Hiring Hall Plan Where at Least One Local in The Port Doing the Same Kind of Work Does Not Have an Existing Seniority System and Hiring Hall Plan

Where at least one local union in a port which has been ordered by this Court to merge hiring halls does not presently have a seniority classification system, the following standards shall apply:

1. All longshoremen who have been classified by their local shall use as his seniority classification the classification which has been assigned to him under his present local's current seniority system.

2. The Review Committee shall devise a seniority plan for the common hiring hall which shall follow the existing plan or plans in the Port as near as possible and which shall not discriminate against any person or on account of race or color.

3. All longshoremen who have not been classified by their local union shall then be classified by the Review Committee under the newly devised seniority system for the common hiring hall.

4. No person's classification shall be reduced unless it is demonstrated that he has not worked a sufficient number of years to warrant his present classification, taking into consideration the seniority system of the local and/or locals with which his local is being required to merge hiring halls, except that appropriate allowances shall be made for the prior effect of the division of the work.

5. Presently classified longshoremen, including those longshoremen classified under paragraph three above, shall have the right to request, upon showing of good cause,

that they be upgraded, which request shall be reviewed as hereinafter provided.

6. Gang members shall be referred to work on the basis of their seniority classification; that is, longshoremen with a higher seniority classification shall be offered job opportunities before longshoremen with a lower seniority classification and not on the basis of race.

7. Gangs shall not be selected or worked on the basis of race.

8. When a gang foreman selects members of his gang, he shall make such selections offering job opportunities to longshoremen with the highest seniority classification and qualifications before offering such job opportunities to longshoremen with a lower seniority classification and qualifications. Qualifications shall mean the ability to perform the job, and if a longshoreman has regularly worked the job in the past, he shall be deemed qualified to work the job. A rebuttable presumption of good faith on the part of the gang foreman in making job assignments shall exist.

9. All persons who were regular, actice gang foremen as of January 20, 1969 or who have been approved as a regular, active gang foreman since that date, shall be eligible to be included on the list of qualified, regular gang foremen, who shall be selected for such list by the Review Committee, as hereinafter provided, on a non-discriminatory basis.

10. Gang foremen shall be selected to work on the basis of their gang's accumulated earnings on a day to day basis, as indicated by a list which shall be prepared and maintained daily. The gang foreman with the least earnings for his gang shall be selected first to carry a gang.

Nothing in the preceding paragraph shall prejudice any gang foreman from being referred to work, other than in the capacity of gang foreman, in line with his seniority classification.

11. Each Seniority System in each Port shall contain a non-discriminatory provision relating to the requirements that must be met in order to gain future (or additional) seniority or to maintain existing seniority classifications. Each longshoreman shall be reclassified on an annual basis within sixty (60) days following receipt of the work records from the ILA Welfare, Vacation and Pension Records for the preceding year, if he is entitled to be reclassified. The Review Committee, hereinafter provided for, shall constitue the committee to make such annual reclassifications.

12. One representative from each defendant local union which is required under this Order to merge hiring halls shall constitute a Review Committee to hear any grievance of any individual longshoreman, that he has been improperly classified or that he has been improperly referred to work in violation of the common hiring hall plan and/or the final Order of this Court.

13. All defendant local unions shall file with the Clerk of this Court a full and complete report showing the common Seniority System and Hiring Hall Plan adopted by them pursuant to this Order and disclose the classification of each individual longshoreman by name. The plaintiff herein, or any local union and any individual longshoreman is granted leave to file in this Court any objections to the common Seniority System and Hiring Hall Plan within sixty (60) days after the filing of such report which relates to him.

IV.

Common Seniority System and Hiring Hall Plan Where No Local Union in the Port Doing the Same Kind of Work Which Has Been Ordered By This Court To Merge Hiring Halls Has A Written Seniority System and Hiring Hall Plan

Where no Local Union in the Port doing the same kind of work which has been ordered by this Court to merge

hiring halls has a written Seniority System and Hiring Hall Plan, the following standards shall apply:

1. The Review Committee, consisting of one representative from each defendant local union which is required under this Order to merge hiring halls, shall establish in such ports for such work a Common Seniority System and Hiring Hall Plan which is non-discriminatory as to race and color.

2. Such Seniority System and Hiring Hall Plan shall in all respects, consistent with conditions in the Port, embody the standards set forth in either Paragraph II or Paragraph III of this Order.

V.

Records and Reporting

A. Each Local shall maintain monthly records which reflect:

1. The name and address of each applicant for membership; the date on which he applied, whether or not he was admitted, and, if not, the reason he was not, but no applicant shall be denied membership because of race or color.

2. A monthly record showing the total number of longshoremen referred by the local union.

3. A monthly record, on a weekly basis, showing the accumulated earnings of all gang foremen.

4. A monthly record showing the individual earnings for the prior month for all longshoremen.

5. Thirty (30) days after the merger of the hiring halls, and every six months thereafter for a total period of two (2) years, a record setting forth the racial composition of all gangs referred, the gang foreman and the company to which referred, shall be kept.

6. All reports required herein shall be racially identified.

If the West Gulf Maritime Association or any other organization maintains, or agrees to maintain such records or similar suitable records which substantially show the above, the defendant need not maintain such records if the West Gulf Maritime Association or other organization agrees to permit inspection of such records by the plaintiff, and has advised counsel for plaintiff thereof.

B. The merged Common Hiring Hall, as provided herein, shall submit to the plaintiff and to this Court:

1. Within thirty (30) days from the establishment of Common Hiring Halls, a seniority list denoting the name, local union and seniority classification of every person.

2. Every twelve (12) months thereafter, for a total period of two (2) years, an updated seniority list noting any changes in any longshoreman's seniority classification.

3. Thirty (30) days after the merger of the hiring halls and every six (6) months thereafter, for a total period of two (2) years, a report listing every person referred through the Common Hiring Hall, the Local Union through which he worked before the establishment of a Common Hiring Hall, and the total number of hours and earnings he received during the previous six months.

4. Thirty (30) days after the merger of the Hiring Halls, and every six (6) months thereafter for a total period of two (2) years, a report setting forth all applicants for membership in each local by name, race, address, and the disposition of their application.

C. Defendants will make all records, applications and other documents relevant to the provisions of this Decree available to plaintiff at the site where such items are kept for inspection, examination and/or copying; if so requested, defendants shall make copies thereof available to plaintiff at plaintiff's expense, but not so frequently as to impose

an unreasonable burden or expense on defendants. The plaintiff shall also have the right to inspect the facilities of defendants during regular business hours.

In addition to the regular reports prescribed above, the defendants shall provide any other information relevant to the requirements of this Decree to counsel for plaintiff upon written request and at plaintiff's expense; but such requests shall not be made so frequently or in such detail as to impose an unreasonable burden or expense on defendants.

VI.

1. The defendant shall cease all discriminatory practices which occur at the Port of Freeport. Black employees shall be permitted to work Dock A-5 without regard to race.

2. At the Port of Galveston, no longshoreman, or no group of longshoremen, shall have any limitation as to the stevedoring companies with which they are permitted to work. The provision in the Collective Bargaining Agreement limiting Local 329 to four stevedoring companies is hereby declared null and void, and defendants are prohibited from enforcing it or causing or attempting to cause any employer or group of employers from enforcing it.

3. In the Port of Brownsville, the work has been allocated on a 75-25% basis between the White and Black Locals respectively, which discriminatory practice shall cease.

VII.

Review Committee

1. Provision has heretofore been made for a Review Committee with one representative from each defendant Local Union which is required under this Order to merge Hiring Halls. In order to insure continuity of such Committees, each defendant Local Union is hereby required to designate, in addition thereto, one Alternate. Each de-

fendant Local Union shall certify to this Court in writing the name of its Representative and Alternate. In the event that either the Representative and/or Alternate fails, refuses, or becomes unable to serve for any reason, each defendant Local Union shall recertify to the Court its Representative and/or Alternate. In the event the Review Committee cannot agree on a Common Seniority System and Hiring Hall Plan or agree upon the proper classification of any individual, one Representative can certify that fact to the Court, who in turn, at his discretion, will either decide the issue or appoint an Arbitrator to make a recommendation to the Court.

2. As a further guideline for each defendant Local Union, the Court finds and concludes and Orders each Review Committee, in the establishment of a common Seniority System and Hiring Hall Plan, to take into consideration the necessity for a stabilized work force in the Port with the technological changes and innovations already made and being made in the Industry, and their impact upon the job requirements of longshoremen in the future.

VIII.

To implement this Interlocutory Decree, the Court hereby appoints A. A. White as Arbitrator to assist the defendants in formulating written common hiring hall plans appropriate to each port and equitable to the longshoremen, consistent with the Court's "Memorandum" heretofore entered and with this Interlocutory Decree. In the event the defendant unions and their representatives are unable to agree on any particular matter or matters, the Arbitrator shall proceed to resolve these differences and shall file with the Court his reasons, together with a summary of the factors considered. The Arbitrator shall have the power to require any party to make available any facts or information which he may consider relevant to his consideration of the disputed matters.

IX.

This Court shall retain jurisdiction of this matter, with full power and authority to issue any additional Orders necessary to insure equal employment opportunities for all ILA members, nonmember referral candidates, or applicants therefor, without regard to race or national origin.

Done This 1st Day of October, 1973 at Brownsville, Texas.

/s/ Reynaldo G. Garza
Reynaldo G. Garza
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Memorandum

(Number and Title Omitted)

(334 F. Supp. 976)

Filed: Nov. 12, 1971

On January 20, 1969, in which was probably the last case filed by the Johnson administration, then Attorney General Ramsey Clark filed the above suit under Title VII of the Civil Rights Act of 1964, alleging a pattern or practice of discrimination on grounds of race, color and national origin, in violation of said Act. The Defendants included the International Longshoremen's Association (hereinafter called the I.L.A.), the South Atlantic and Gulf Coast District of the I.L.A. (hereinafter referred to as District), and thirty-seven local general cargo longshoremen's unions chartered by the I.L.A., all of whom are labor organizations within the meaning of 42 U.S.C. 2000e(d), and all of whom are engaged in an industry affecting commerce within the mean-

ing of 42 U.S.C. 2000e(e). As has been stated, the United State has alleged that the Defendant unions have engaged in a pattern or practice of discrimination on the grounds of race and national origin, more particularly that the Defendants have maintained local unions, hiring halls and gangs, which were classified and segregated on the grounds of race and national origin, and that this has resulted in the denying of equal working opportunities to Negro and Mexican-American longshoremen, because of their race or national origin, and that the District, in its contract negotiations with employers, has caused such employers to also discriminate on the grounds of race and national origin. The United States asks this Court to order a merger of the segregated locals and the discontinuance of separate locals, hiring halls and gangs based upon race and national origin, and for such further steps as would be necessary and proper.

With the exception of two Negro locals, one in Galveston and one in Brownsville, both with special problems that will be referred to further on in this opinion, all Defendants are opposed to the merger of locals that the Government proposes, and deny any violation of the Civil Rights Act of 1964.

It took some time to serve all Defendants and for answers to be filed, and with the exception of a few depositions and communications between the United States and some of the attorneys for the Defendants, very little was done in preparation for the trial of this case, until this Court, on May 12, 1970, set a pre-trial in this cause to be held in Houston, Texas, on Tuesday, June 23rd, and the trial of the same was set for Houston, as a place within this District convenient to counsel and witnesses, for July 13, 1970.

In preparation for trial, the depositions of officials of every one of the Defendants were taken.

At the pre-trial on June 23, 1970, the parties agreed to stipulate to as many facts as possible to shorten the time

of trial. This was done and an extensive stipulation was filed by the parties, which has been very helpful to the Court.

At the pre-trial, the Defendants urged this Court to dismiss the cause of action on the grounds that the attempt by the United States to merge the local longshoremen's unions was a violation of their constitutional right of association under the First Amendment. The Court took the motion to dismiss on these grounds under consideration, and said it would carry it along with the case. The motion to dismiss on these grounds is now denied.

The Court heard testimony in this cause from July 13th through July 17, 1970, and from September 9th to September 17, 1970. During the trial, hundreds of exhibits, some of them rather bulky, were received in evidence, and the Court has had to read the same and assimilate their contents. The parties, at the conclusion of the trial, were allowed to file briefs, and a schedule was set up, which, at the request of counsel, had to be extended. In the meantime, some of the Defendants asked to reopen the record for the filing of additional exhibits, all of which requests were granted.

The Defendants in this cause of action represent longshoremen and warehousemen who load and unload ships at warehouses in ports along the Texas Gulf Coast, at Orange, Beaumont, Port Arthur, Galveston, Texas City, Houston, Freeport, Port Lavaca, Corpus Christi and Brownsville. The membership of each local union in these ports is totally segregated on the basis of race or national origin. Of the thirty-seven local unions which are party Defendants, sixteen locals were for White longshoremen and have no Negro members, and nineteen were for Negro longshoremen and have no White members, and two locals are composed predominantly of Mexican-American longshoremen.

Because of the Texas Right-to-Work Law, all the locals service and refer many non-members. In fact, it was surprising to find that many, many of the longshoremen are not union members, but the work through the local union hiring halls. Under the contracts with the employers, the union gets a certain amount from the employer for every longshoreman, be he union member or not, some of this money going to the pension and welfare funds, and the balance to the coffers of the unions, and even non-union members are entitled to attain seniority as longshoremen and to participate in their pension and welfare plans.

While attempts were made to prove to this Court that a Negro could apply for membership in a White local and vice versa, it is obvious that a Negro does not apply to a White local, and a White does not apply to a Negro local for membership. Negro longshoremen have to be referred out of a Negro local hiring hall, and White longshoremen are referred out of a White longshoremen's hiring hall. While there may have been exceptions in the past, they have been few and far between. The evidence shows that some coastwise general cargo locals have been merged with some deepsea general cargo locals in their respective ports. The Negro coastwise general cargo locals have been merged with Negro deep-sea general cargo locals, and the White coastwise general cargo locals have been merged with White deep-sea general cargo locals, this happening since the filing of this action.

It has been stipulated that the I.L.A. chartered the locals on the basis of race, and there is no question that it has maintained these locals on the basis of race, has at all times been aware of their segregated nature and has done nothing to seek their merger, or to charter integrated locals since the passage of the Civil Rights Act.

Negro union officials who testified before the Court have urged the Court not to order a merger. They say that by the maintenance of "sister locals" in every port, the

Negroes, by having their own unions and their own union officials, have been able to better themselves by being able to hold high positions in their locals, and have been recognized in the community as a separate, powerful voice for the Negro communities, and have attained for them and the Negro people of the community, a standing which they could not have otherwise attained. The Court believes that they are correct in this assumption, but the ultimate issue before the Court is whether this pattern or practice of having segregated locals is keeping longshoremen, be they Black or White, from equal working opportunities on account of a longshoreman's race or national origin. With the exception of the port of Brownsville, generally the longshoremen's work is divided between the White and Negro locals on a fifty-fifty basis. On its face, this would seem to be a fair shake for the races. but this does not tell the whole story. If in any port there are one hundred Whites available to work on the waterfront as longshoremen and two hundred Negroes, and the work is divided fifty-fifty between the locals, it is obvious that the one hundred Whites will work more hours than the Negroes. The fifty-fifty rule would be ideal if there were an equal number of White longshoremen to Negro longshoremen in every port, but this is not the case. The same situation would exist if instead of one hundred White and two hundred Negro longshoremen, there would be two hundred White and one hundred Negro longshoremen in a given port. In that situation, the Black longshoremen would work more hours than the White. While the Civil Rights Act of 1964 was passed to aid Negroes and other minorities, it was passed to help Whites as much as Negroes, if their civil rights are being violated, and this Court can foresee where in many situations, now and in the future, the Whites will be asking for the protection of Title VII of the Civil Rights Act of 1964.

The Defendants opposing the proposed merger of the "sister locals" have argued vehemently that the Negroes,

whom the Government assumes to protect by this cause of action, are going to be the losers if the Government prevails; that the Negroes in the several ports involved in this lawsuit are getting 50% of the work, even though the racial composition of the communities is far less than 50%. They urge upon the Court that the Government in the construction industry has brought forth the so-called Philadelphia Plan, seeking job opportunities on the basis of the racial ratio in the area and community, and that if this Plan were to be put into effect, Negroes would only have 19% of the work in Houston, 21% of the work in Galveston, 30% in Beaumont, 27% in Port Arthur, 25% in Orange, 12% of the work in Freeport, 5% of the work in Corpus Christi, and only 1% of the work in Brownsville. They are off target in their argument. It is not the racial composition of the community that should control, but the number of Blacks and Whites that make themselves available for longshore work that counts.

From the many Exhibits before the Court, it is obvious that even under the fifty-fifty rule, Negroes, and in some cases Mexican-Americans, having been segregated on the basis of their race or national origin, have been forced to accept a diminished opportunity to earn wages, receive union benefits, work better cargo and otherwise enjoy employment opportunities solely on the basis of their race. A comparison of the earnings of segregated "sister locals" shows that not only the total earnings of the Negro locals, but also the earnings of individual Negro longshoremen, are less than those that work out of the White local.

Much of this disparity is due to the earnings of individual workers on the waterfront who are members of the locals, but who are hired directly by the employers, and who are not referred by the locals, most of whom are Whites, such as the so-called Gearmen. This situation has been known for a long time, and yet the contracts entered into by and between the industry and the longshoremen

have not attempted to correct this situation. However, in fairness to the unions, it must be said that they have tried, in most cases, most diligently to give 50% of the work to the Whites and 50% of the work to the Blacks, the trouble lying in the basic fact that the 50% given to the Negroes has had to be divided amongst a greater number of Negro longshoremen.

The Government has urged in this case that the very existence of segregated locals is a "per se" violation of Title VII of the Civil Rights Act of 1964. The Government has already been successful in a similar case in upholding this theory. *United States of America* v. *International Longshoremen's Association, Atlantic Coast District, International Longshoremen's Association, and Locals 829 and 858, I.L.A. Baltimore, Maryland,* D. Md. 1970, 319 F.Supp. 737 . This case has been cited with approval by this Circuit in *United States of America* v. *Jacksonville Terminal Company,* 451 F.2d 418 (August 31, 1971). In that case, the District Court had held that having segregated locals was not a "per se" violation of Section 703(c) of the Act, 42 U.S.C.A. § 2000e-2(c). *United States of America* v. *Jacksonville Terminal Company,* 316 F. Supp. 567 (M.D. Fla. 1970). Our Circuit, speaking through Judge Dyer, in reversing the case said:

> "Contrary to the allegations made by the Unions, we find that their locals are not mere 'social clubs', having no influence in national union policy or practice. We conclude that the District Court erred in refusing to hold that the failure to consolidate the locals violates section 703(c) of the Act, 42 U.S.C.A. 2000e-2(c). See *United States* v. *Sheet Metal Workers Local 36, supra* at 127-129; *Local 53, International Association of Heat & Frost Insulators & Asbestos Workers* v. *Vogler, supra* at 1051-55; *United States* v. *International Longshoremen's Association,* D. Md. 1970, 319 F.Supp. 737, 741-42; *Hicks* v. *Crown Zellerbach Corp.,* E.D. La. 1970, 310 F. Supp. 536; *United States* v. *Local 189, United Papermakers & Paperworkers,* E.D. La. 1969, 301 F. Supp. 906, 919, *aff'd,* 5 Cir., 416 F.2d 980."

If the maintenance of segregated locals is a "per se" violation of the Civil Rights Act, there the matter ends, and the relief sought by the Government, as far as ordering the merger of locals in this case, has to be granted. There is no question that segregated locals were so chartered and are still maintained. See also, *Musicians' Protective Union Local No. 274, A.F. of M., and James Adams, on his own behalf and on behalf of all others similarly situated* v. *The American Federation of Musicians of the United States and Canada,* E.D. Pa. 1971, 329 F.Supp. 1226.

However, this Court cannot believe that it was the intention of Congress to condemn all segregated locals. If it were, they could have easily said so. The Government must still show that the maintenance of segregated locals constitutes a pattern or practice depriving individuals of working opportunities, because of their race or national origin. However, in this case, the Government has discharged this burden.

In the case of the port of Brownsville, the White local, which has many Mexican-American members, has been given 75% of the work, and Local 1368, a Negro local, has been given only 25% of the work, and naturally, Local 1368 feels that they should be getting 50% of the work, and is therefore in favor of merger. A history of the Brownsville controversy shows that many of the Negro longshoremen seeking work in the port of Brownsville were recruited from other ports, and the local longshoremen resisted their coming down to take their jobs. The controversy resulted in the establishment of the seventy-five - twenty-five rule. The situation in Brownsville only serves to point out the inequities that can result from segregated locals.

The undersigned Judge is a lifetime resident of Brownsville, Texas, and was present when the first ship came up the Brownsville ship channel to the port of Brownsville, and even though not in the record in this case, if I may be permitted, I will recall the situation of longshoreman work

in the port of Brownsville, as I remember it. When having a deep-water port at Brownsville and Port Isabel, Texas, was to become an accomplished fact, a group of men, mostly Anglo, applied for a charter to the I.L.A. The original fight was not so much between Whites and Blacks, as it was between Anglos and Mexican-Americans, who at first were having a hard time getting into the local. There were few Negroes living in the city of Brownsville, and the few that lived there had not been engaged in longshore work. Most of them worked for the railroads, a few were hotel porters, some were barber shop shoeshine boys, and one worked for the Coca Cola Bottling Company. When the Whites applied for a charter, a group of Negroes, in line with the practice of the I.L.A. to have "sister locals", applied for a charter for a Negro local. Most of the membership of the Negro local had to come from outside the Brownsville-Port Isabel area. The local people comprising the White local and those working out of its hiring hall, naturally resisted the influx of outsiders who took their jobs away from them. This Court is convinced that if the practice of having segregated locals had not been in effect, and the few Negroes who were available for longshore work in the port of Brownsville had been allowed to join the White local, the Brownsville situation would never have arisen.

The concern of the Government in this case with the situation of Mexican-Americans, has been mainly brought about by Local 1576 in Galveston. None of its members are Negro, and there are a few Anglos, and the membership is composed mainly of Mexican-American longshoremement. The charter of this local provides that its members can only work bananas and green fruit. This type of work has been drastically reduced, and the members of Local 1576 have very little work at present. It has been testified that the work of unloading bananas and green fruit is the most difficult, physically, of work done by other deep-sea locals. We have a situation where the members of Local

1576, most of whom are Mexican-American as has been stated above, are able-bodied individuals wanting to do longshore work, but being limited in the opportunity of doing this type of work, because of its charter. It has been shown that they must work out of other hiring halls, instead of their own, but when they appear at said hiring halls, they compete with so-called "casuals", who are not union members. Testimony was received that Local 1576 has taken up the matter of the restriction in their charter with both the District and I.L.A., but the charter remains unchanged. They are not even included in the West Gulf Maritime Association Agreement, even though this has been requested.

There is no question that individuals belonging to 1576 have been denied an opportunity to work as longshoremen, because of the restrictions on their charter. Local 1576 is not seeking a merger, but apparently is demanding an equal right to longshore work in the port of Galveston.

Another local that has joined hands with the Government in seeking a merger of the locals is Local 329. Local 329, a Negro local, is only allowed by the I.L.A. to work for four stevedoring companies. At one time, these companies had a lot of business, but the type of cargo they handled has now dwindled, and Local 329 finds itself with very little work. The problems caused by this situation would not exist if all longshoremen at the port of Galveston belonged to one local. Local 329 has for years been asking the District and the I.L.A. for relief, but to no avail. The Stevedoring companies have also joined in asking that Local 329 be given more work.

The basic finding that the Court is making in this cause is that the Defendants have chartered and still maintain locals on a segregated basis, that the prevailing rule of dividing the work fifty-fifty between the White and Negro locals violates Title VII of the Civil Rights Act of 1964, because it deprives longshoremen, be they Black or White,

Anglo, Mexican-American or Negro, equal working opportunities depending on which group is in the majority in the different ports, and that this will be a continuing violation in the future.

A merger of locals brings with it many problems, which have to be resolved in the issuing of an equitable decree.

The evidence shows that locals own their own property, on which are housed their hiring halls, these properties not being of the same value, as amongst "sister locals". The question of seniority is also present. Although evidence shows that the I.L.A. and the District have insisted that every local have a seniority system, no real attempt at having the same seniority system within every local has been undertaken. Since no standard seniority system has been in practice in all the locals, this poses a terrific problem in modeling an equitable decree. The basic hours the longshoremen have to work to achieve seniority have differed greatly from one local to another. Since seniority and the hours worked affect the pension and welfare rights of individual longshoremen, the Court has to be mindful of the great necessity of protecting the rights of those who have spent their lives on the waterfront, as compared to those who only work on the waterfront as a sideline.

Nor is this Court satisfied that the only solution to the problem must include a merger of the locals, for a plan or scheme can be devised that would eradicate the inequity of the basic finding made above, unless the opinion in *United States* v. *Jacksonville Terminal Company, supra,* dictates such a course.

This Court finds that some of the relief sought by the United States is forthcoming. The Defendants, I am sure, do not agree with this conclusion, and an appeal is almost certain.

The Government has submitted to the Court a proposed decree, with which this Court is not in agreement, as in my

view, parts of the proposed decree do violence to the Civil Rights Act and my interpreatation of the intent of Congress. A decree that orders the merger of the locals will, of necessity, be different than a decree under the Act that does not so provide. I, therefore, certify under 28 U.S.C. 1292 (b) that my findings involve a controlling question of law, as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of this litigation, and it is the hope of the undersigned that the Honorable Circuit Court of Appeals for the Fifth Circuit will accept an appeal under 28 U.S.C. 1292(b), to determine whether the record in this case entitles the United States to relief, and whether such relief should include an order of merger of the locals involved.

Counsel for the parties will meet to try to formulate a decree for entry in this cause, upon a denial of an appeal under 28 U.S.C. 1292(b), or a final ruling of the Circuit Court of Appeals for the Fifth Circuit, and within sixty, days of either event, either submit a proposed decree agreeable to all, or inform the Court of their inability to submit such decree, with their analysis of the points they cannot agree upon.

The Clerk will send copies of this Memorandum to counsel for the parties.

DONE at Brownsville, Texas, this 12th day of November, 1971.

/s/ Reynaldo G. Garza
Reynaldo G. Garza
United States District Judge

Motion for Entry of Judgment

(Number and Title Omitted)

Filed: Nov. 6, 1972

The United States, plaintiff in the captioned case, respectfully moves this Court to enter a final Decree in accordance with the Opinion of the Court dated Noevmber 12, 1971.

This Motion is supported by an accompanying Memorandum.

Respectfully submitted,

/s/ Douglas B. Huron
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